In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1544

LAWRENCE WINGATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question raised by the petition is whether petitioner's plea of guilty to a charge of attempting to evade income taxes had a factual basis and was made voluntarily and with an understanding of the charge.

Petitioner and his wife were each charged by an indictment filed in the United States District Court for the Eastern District of Michigan with five counts of having willfully attempted to evade and defeat their income taxes for the years 1966 through 1970.

On July 10, 1973, petitioner and his wife, both of whom were represented by counsel, entered pleas of guilty in open court after being questioned extensively by the court (Pet. App. C 23-31). On September 28, 1973, petitioner was sentenced to 14 months' imprisonment and was fined $10,000; his wife was given an 18-month suspended sentence, placed on four years' probation,

and fined $10,000 (Pet. App. D 34-35). On the same day, the court granted the government's motion to dismiss the remaining four counts of the indictment (Pet. App. D 36).

On October 5, 1973, petitioner filed a motion in the district court for leave to vacate his sentence and withdraw his guilty plea on the ground that the court had not complied with Rule 11 of the Federal Rules of Criminal Procedure. Petitioner alleged that his plea was not shown to have been voluntarily made and with an understanding of the charge, and that there was no substantial factual basis made out for the plea. In a memorandum order,[1] the district court denied the motion. The court of appeals affirmed, finding petitioner's contentions to be "wholly without merit" (Pet. App. E 37-38).

Petitioner argues (Pet. 7-13) that the distict court did not follow *McCarthy* v. *United States,* 394 U.S. 459, with respect to its acceptance of his guilty plea under Rule 11. He urges that the court did not inform him of the nature of the charge and that there was no factual basis for his plea. But the transcript of the proceedings at the time petitioner's plea was accepted demonstrated that the court carefully explained to him the elements of the offense, the manner in which it was alleged to have been committed, the amount of income and tax alleged to have been willfully evaded, and the possible consequences of entering a plea of guilty (Pet. App. C 23-28). At this hearing petitioner indicated that he understood the charge and that he was pleading voluntarily (Pet. App. C 24-25). Moreover, petitioner responded to the court's questions that no one had

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[1]A copy of the district court's memorandum order is attached hereto as an Appendix, *infra.*

promised him anything to induce him to plead guilty, that no one had advised him that the court would impose a less severe sentence if he pleaded guilty, and that he knew that the consequence of a guilty plea could be a term of five years' imprisonment and a $10,000 fine (Pet. App. C 25-29). The court then undertook to determine why petitioner thought he was guilty. He responded that he "just didn't file enough" (Pet. App. C 26). In answer to the court's question of whether he had income in the amount of $85,000 in 1969—about twice the amount reported—petitioner replied, "I must have" (Pet. App. C 26). Finally, petitioner acknowledged at the hearing that he was in the gambling business, that he kept no books or records, and that the amounts of income which were furnished to his tax return preparer were largely determined from bank deposits (Pet. App. C 27-28).

Although petitioner principally relies upon *McCarthy* v. *United States*, 394 U.S. 459, that case is plainly distinguishable. In *McCarthy*, the district court not only did not ask questions upon which it could determine the factual basis for the plea, but it did not even state to the defendant the elements of the offense with which he was charged. The court merely relied upon statements by the defendant's attorney (394 U.S. at 473-474). Here, however, the court carefully informed petitioner of the nature of the charge and thoroughly questioned him and his attorney concerning the factual basis for the plea.

Petitioner further argues (Pet. 11-12) that his plea should have been vacated because he made some statements indicating that he did not realize he was not reporting all of his income. However, in *North Carolina* v. *Alford*, 400 U.S. 25, the Court upheld

the acceptance of a plea of guilty where the defendant had claimed his innocence at the time he entered his plea. The Court stated (400 U.S. at 37-38):

> When his plea is viewed in light of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, see *McCarthy* v. *United States, supra,* at 466-467 (1969), its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it. [Footnotes omitted.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

JUNE 1974.

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It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA, PLAINTIFF,

v.

LAWRENCE WINGATE, ANNIE WINGATE, DEFENDANTS

Criminal No. 48528

MEMORANDUM ORDER

On July 10, 1973, the defendants entered a plea of guilty to the fourth count of the indictment charging that they ". . . did knowingly attempt to evade and defeat a large part of their income tax due and owing . . . for the calendar year 1969 by filing and causing to be filed . . . a false and fraudulent joint income tax return wherein it was stated that the taxable income . . . was the sum of $42,193.64 . . . whereas they then and there well knew their joint taxable income . . . was the sum of $85,278.21."

Subsequent to the imposition of sentence, defendant LAWRENCE WINGATE filed a petition for withdrawal of his guilty plea. Defendant alleges that the court failed to fulfill the requirements of Rule 11 of the Federal Rules of Criminal Procedure. Defendant LAWRENCE WINGATE asserts that without an understanding of the formal charge against him, his plea cannot be considered voluntary; and, further, that the court failed to ascertain that there was a factual basis for the plea. Specifically, the defendant alleges that he was only guilty of understating his income for the year 1968 and that he did not ". . . wilfully and intentionally attempt to evade and defeat a large part of the income due and owing the United States of America . . ."

and that this specific intent must be established by evidence other than the mere understatement of income.

Rule 11 of the Federal Rules of Criminal Procedure requires that the district court ascertain that a plea is made voluntarily with the understanding of the nature of the charge and the consequence of the plea. The Rule thereafter provides:

> ". . . the court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

The petitioner does not dispute that the court adequately determined that his plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea. We have concluded that the record adequately demonstrates that the court ascertained that there was indeed a factual basis for the plea. The record contains the following:

* * *

> "THE COURT: Now, do you understand that this count, the fourth count of this indictment, charges you with knowingly and wilfully attempting to evade and defeat a large portion of your income tax on your 1969 return by filing and causing to be filed a false and fraudulent joint income tax return wherein you stated that your taxable income for that calendar year was $42,193.00 and that you owed $14,512.00, whereas you had an income of $85,000.00 and should have paid an income tax of $40,000.00? Do you understand that?
>
> "MR. WINGATE: Yes.

* * *

"THE COURT: Well, tell me what you did, Mr. Wingate, that makes you think you're guilty.

"MR. WINGATE: *Well, I just didn't file enough.*

"THE COURT: You knew that you had to file more?

"MR. WINGATE: Well, I didn't know. I thought I was filing right, I thought, but I find I wasn't, so I couldn't tell, see.

" THE COURT: Well, did you have income in the amount of *approximately $85,000.00?*

"MR. WINGATE: *I think I must have, I must have.*

"THE COURT: Who filled out your return?

"MR. WINGATE: Let's see.

"THE COURT: Did you have it done for you?

"MR. WINGATE: Yes, sir.

"THE COURT: Did you tell him all that you made?

"MR. WINGATE: Well—

"THE COURT: Where did he get the figure $42,193.64, from you?

"MR. WINGATE: *Yes. He got what I, you know, gave him.* I thought, you know, I was giving him enough.

"THE COURT: You thought you were giving him enough, but you knew you weren't giving him it all, didn't you?

"MR. WINGATE: No, I thought I was giving— you know, my knowledge, you know.

"THE COURT: Well how could you give him forty-two thousand when you made eighty-five? It looks like you gave him information concerning half of what you made.

Was this a joint return, Mr. Walker?

"MR. WALKER: Yes, your Honor. The return was prepared for them by a man that's familiar with making out tax returns, and they did not have records, they didn't keep books. Their income was arrived at, I believe, in conference with this man that made out the return, and income was determined largely from deposits.

"THE COURT: Well, how does the government compute the eighty-five thousand?

"MR. WALKER: By net worth.

"THE COURT: What do you do for a living, Mr. Wingate?

"MR. WINGATE: Well, I been fixing, doing carpentry work, houses and stuff like that.

"THE COURT: You've been doing what?

"MR. WINGATE: Carpenter work.

"THE COURT: Carpenter work?

"MR. WINGATE: Yes.

" THE COURT: Well, you didn't make forty-two thousand dollars doing carpenter work, did you?

"MR. WINGATE: No, no. That's what I—

* * *

"THE COURT: In other words, you had income in addition to your carpentry work?

"MR. WINGATE: Yeah, uhm-hmn.

"THE COURT: What was that income from?

"MR. WINGATE: Well, I was doing a little gambling.

"THE COURT: Gambling?

"MR. WINGATE: Yes.

"THE COURT: You're a gambler?

"MR. WINGATE: Well, yes, I am.

"THE COURT: What you're telling the court is that you didn't declare any of your gambling income? Is that what you're telling me?

"MR. WINGATE: Well, this—

"MR. WALKER: I don't think that's quite right, your Honor. The gambling income went into the bank account, too.

"THE COURT: Did all of it?

"MR. WALKER: Well, apparently not, according to the reconstruction by use of a net worth.

"THE COURT: Well, the net worth was acquired by the accumulation of deposits in and out of the account?

"MR. WALKER: No; assets, increase of assets.

"THE COURT: Assets?

"MR WALKER: Each year, over increase of obligations.

"THE COURT: Well, the bank deposits were part of the increased asset theory?

"MR. PRITCHARD: Your Honor, that's right. Mostly it was just assets minus his liabilities. We came

up with the net worth increase of over half in that one particular year, some eighty-some thousand dollars, when he should have reported that amount and only reported forty-some thousand.

"THE COURT: Is that correct, Mr. Wingate?

"MR. WINGATE: Yes.

"THE COURT: All right, I'll accept the plea from Mr. Wingate and I'll refer him to the probation department for pre-sentence investigation report."

It is clear from the above that the defendant indicated that he did not report all his income.[1] The defendant's tax return was filed on his behalf by a person knowledgeable in the filing of tax returns. The defendant advised that the individual filing his return did so upon information received from the defendant. But, it is quite clear that the defendant, because of his failure to keep adequate records, was not conscious of the amounts he actually earned. The defendant is in the gambling business and it is apparent the records from this business were not adequate. The defendant believed he was reporting a sufficient amount to cover income derived from that business.[2] The defendant's true income was computed by a net worth analysis. The defendant was not nor could he be expected to know the precise amount of income stated in the indictment. But, the

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[1]This is the only conclusion the court could draw from defendant's statement "Well, I just didn't file enough." When directly asked by the court whether he had income in the amount of approximately $85,000, the defendant answered "I think I must have, I must have."

[2]The defendant stated: "No, I thought I was giving – you know, my knowledge, you know."

"MR. WINGATE: Yeah, uhm-hmn.

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record discloses that the defendant was aware that he had substantial income in addition to the amount derived from carpentry work. The large amount of income not reported, together with the knowing failure to keep adequate records of income earned, is sufficient for a finding that the defendant knowingly and wilfully evaded a large portion of his tax. *Holland* v. *United States*, 348 U.S. 121, 139 (1954). The government need not show the precise amount defendant attempted to evade, but rather only that a substantial amount was in fact evaded.

Accordingly, the petition to withdraw the plea of guilty should be and hereby is denied.

ROBERT E. DEMASCIO
United States District Judge

Dated: Nov. 1, 1973.